No. 12738

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED D. HILLIARD, As Receiver of JESSE M. CHASE, INC., A Corporation,

Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Brief of Appellee

Appeal from the United States District Court for the District of Idaho, Eastern Division.

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GATEWAY PRINTERS - POCATELLO

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Page

TEXTBOOKS

STATUTES

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STATEMENT OF FACTS

The appellant, as receiver for Jesse M. Chase, Inc., first ommenced an action in the State Court in Bannock County, gainst Everett M. Evans, United States Marshal and Louise 3. Sisil, to restrain the sale of certain real estate described in he appellant's complaint, by the United States Marshal. This, the application for an injunction or restraining order vas denied by the District Judge.

At the time the application for injunction was presented, he appellee herein had not been served with summons. After he refusal of the State Court to enjoin the United States Mar- hal, plaintiff amended its complaint dropping the Marshal s a party and made service upon Mrs. Sisil (Tr. pp. 41-42).

It developed during the trial of the case that the appellant herein, after the commencement of the action to quiet title to the real estate described in his complaint, sold and transferred by warranty deed, all of his interest in and to the real estate, to C. C. Anderson Company, a corporation of Idaho. This matter is referred to repeatedly in the testimony. (Pages 82, 83 and 84).

The trial Judge's Finding of Fact No. XII, page 27, found:

> "That the plaintiff herein, subsequent to the rendition and entry of the judgment in favor of Louise B. Musselman Sisil and against Jesse M. Chase in Case 1539 as aforesaid and subsequent to the filing and recording of an abstract of said judgment in the office of the County Recorder of Bannock County, Idaho, sold the real estate described in plaintiff's amended complaint."

No objection is made as to this Finding except in No. 6 of the Statement of Points found on Page 103, it is stated:

> "The trial court erred in making Finding of Fact XII for the reason that same is a conclusion of law, contrary to both the evidence and the law."

The appellant offered in evidence portion of an abstract of title, plaintiff's Exhibit No. "4", supplemental abstract of title. Page 39.

This exhibit is with the Clerk of the Circuit Court, counsel for appellee does not have a copy of the same but is advised by counsel for appellant and the abstractor who certified to

ne same that the abstract shows conveyance of the real estate escribed in the complaint by warranty deed from Donald L. Burnett, receiver, as grantor, to C. C. Anderson Company of Caldwell, Idaho, an Idaho corporation, as grantee, on the 10th day of February, 1950, which deed was recorded February 21, 1950, being Instrument No. 271133, recorded in 108 Book of Deeds at Page 90. The consideration is shown n the deed and the testimony in reference thereto and the finding of the Court establishes definitely and we are sure without ny controversy that on May 2, 1950, when this case was ried, the appellant had no interest, legal or equitable in the eal estate involved and no request or motion was at any time nade for the substitution of C. C. Anderson Company as plaintiff or for permission to carry on the suit in the true owner's name.

The record also shows that Jesse M. Chase, Inc., transferred all of its interest in and to the real estate involved by a quitclaim deed to C. C. Anderson Company, which deed was dated February 20, 1950 and recorded February 21, 1950, being Instrument No. 271134.

It thus clearly appears that not only the receiver who was the receiver for Jesse M. Chase, Inc., transferred all of his interest as receiver, but that the corporation also for the purpose of satisfying the purchaser, transferred all of its interest and the exhibit also shows that Jesse M. Chase and his wife, as individuals, on February 8, 1950, by quitclaim deed transferred to Donald L. Burnett, as receiver, all of their interest in the real estate. This deed was recorded February 21, 1950. Regardless of whether the title at the time of the United States

Marshal's sale of the real estate by appellee, vested as a matter of law in Chase as an individual or Jesse M. Chase, Inc., both Chase and the corporation, in February of 1950, transferred all their interest in and to the property.

When the title insurance had been issued to the C. C. Anderson Company, the entire matter was consummated on February 21, 1950, and all of the quitclaim deeds and the warranty deed to C. C. Anderson Company were recorded at the same time, being Instrument Nos. 271131 to 271134, inclusive.

Exhibit "14" is a transcript of evidence taken in the State Court upon the application of one Youngren, plaintiff versus Jesse M. Chase, Inc., for the appointment of the receiver and is directly referred to in the testimony of witness Chase, pages 64-65 and in that action, the corporation did not file any answer or pleading whatever in reply to the complaint asking for a receiver and the witness Chase appeared voluntarily at the hearing and strenuously urged the appointment of the receiver. The proceedings and his testimony, as shown by Exhibit "14" and the entire record, not only in that case but in the instant case, show that Jesse M. Chase was the instigator of the action filed for the appointment of a receiver and testified directly that he was insolvent, that he had nothing with which to pay any obligations and also testified in the instant case that Jesse M. Chase, Inc., owed and was obligated for the judgment entered in favor of Mrs. Sisil, the appellee in case 1539 and the corporation should pay the same. (Page 70.)

Testimony: "Q. the judgment, of course, is an obligation of the corporation just as much as any other obligation the corporation has? A. That is right."

After the appointment of the original receiver, Mr. Hilard, Jesse M. Chase made a report, defendant's Exhibit "6", nder date of November 17, 1949, in which he said:

Coment: "It is my personal opinion that a receiver is necessary to liquidate the affairs of Jesse M. Chase, Inc., in order to make a fair and equitable distribution to all classes of cases".

This report, Exhibit "6", purports to set fourth the assets of Jesse M. Chase, Inc., and its liability and in the same eport is found the following:

"Judgment Creditors". Under the heading of "Judgment Creditors", on page 6 is the following statement: "Louise B. Musselman Sisil, Judgment in U. S. District Court on Investment Certificates_____$; United States Marshal's Execution Sale set for November 26, 1949—Judgment against Jesse M. Chase, attachment and execution against property owned by Jesse M. Chase, Inc."

At the close of testimony by the appellee application was made (page 75) for permission to amend the defendant's answer by pleading affirmatively. The appellant objected to the amendment unless given an opportunity to defend against the same.

"The Court: The amendment will be allowed and you will be permitted to offer any defense you desire."

The Court rendered a Memorandum Decision on the 2nd day of August, 1950 and thereafter made Findings of Fact

and Conclusions of Law and entered Judgment in favor of the appellee as heretofore referred to. By Finding No. XII, the Court found that the plaintiff, appellant herein, had sold the real estate described in the amended complaint and also found that the appellee had established her defense and that the lien of the appellee, in what is referred to as Case No. 1539 in the Federal District Court, was a lien upon the real estate standing in the name of Jesse M. Chase, Inc., the corporation standing in the shoes of Jesse M. Chase, an individual, who had organized the corporation entirely for his own benefit and who, with the exception of qualifying shares of stock issued to his employees, owned at all times at least Seventeen Hundred Sixteen (1716) shares of the common stock of the corporation with only Seventeen Hundred Fifty-nine (1759) issued and outstanding.

It is thought that a further recital of the facts is not necessary in view of the record.

SUMMARY OF APPELLEE'S POSITION

The legal principles involved are not unusual or particularly complicated but because of the fact that other proceedings are referred to and were referred to at the trial of the case by the different parties and the fact that proceedings in both the State and Federal Court in other actions entered into the facts, the record is not as smooth or satisfactory as it could be. However, the matter follows the general pattern in this type of cases.

The appellee contends that, at the time of the trial, the proceedings show definitely by the appellant's testimony that

the appellant was not the real party in interest; that he had divested himself entirely of any title and that the case could not proceed successfully insofar as the appellant's complaint was concerned without either a substitution of party or an application on behalf of the C. C. Anderson Company, the owner; that the proceeding be carried on in its name, it of course, being obvious that C. C. Anderson Company insisted upon the issuance of title insurance to it and that being fully protected, it did not and does not desire to be a party to this litigation. Rule 17A of Federal Rules of Civil Procedure. (Hereinafter copied at length).

When the facts disclosed at the time of the trial that C. C. Anderson Company, for the sum of Eighty Thousand Dollars ($80,000), had purchased the real estate, it immediately became apparent that C. C. Anderson Company was an indispensable party and that suit could not proceed. Rule 19A, Federal Rules of Civil Procedure. (Hereinafter copied at length).

The receiver of Jesse M. Chase, Inc., can not claim any greater or other title than the corporation itself holds or could claim and one seeking to quiet title can assert no stronger claim than his predeccessor in interest and receiver can not have any stronger claim than the party for whom he is acting as receiver.

The appellee having recovered a judgment against Jesse M. Chase and contending that any transfer of title to Jesse M. Chase, Inc., a corporation formed and owned for his benefit was fraudulent as to creditors and fraudulent as to her, could

proceed with a direct sale of real estate standing in the name of the corporation without taking any other action.

The attempted sale and transfer by Jesse M. Chase to the corporation, organized solely by him for his own benefit under the circumstances and conditions shown by the record was a direct fraud upon the appellee.

The attempted sale and transfer of the assets of Jesse M. Chase to Jesse M. Chase, Inc., when practically all of the assets were personal property and where a business consisting generally of the sale of used cars and parts and his assets were almost totally made up of used car parts and equipment without complying with the Bulk Sales Act of Idaho, was fraudulent and void as to his creditors.

ARGUMENT

I.

THE APPELLANT IS NOT AND NEVER WAS, SUBSEQUENT TO THE 20TH DAY OF FEBRUARY, 1950, THE REAL PARTY IN INTEREST AND THE C. C. ANDERSON COMPANY, THE OWNER AND HOLDER OF THE TITLE TO THE REAL ESTATE DESCRIBED IN PLAINTIFF'S AMENDED COMPLAINT, WAS AT ALL TIMES ON AND AFTER THE 20TH DAY OF FEBRUARY, 1950, AN INDISPENSABLE PARTY.

Rule 17 of the Rules of Civil Procedure, Sub-division A. is as follows:

> "(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest:

> but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

Section 5-301, Idaho Code, provides:

> "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by this code."

There is no difference or distinction between the Idaho Statute and the Rules of Civil Procedure so far as the requirements that an action be prosecuted by a real party in interest The Supreme Court of Idaho in the case of Carrington vs. Crandall, 63 Idaho 651, 124 Pac. 2d 914, has passed upon the question raised by appellee in an action where the facts are so similar that the decision certainly is entitled to great weight. The Supreme Court in this action decided that where a plaintiff commenced an action to quiet title to real estate and thereafter by warranty deed transferred the title to a third party prior to the trial of the case, that in the absence of a request of the true owner, either to be substituted or to permit the original plaintiff to proceed with the action, could not be maintained and that a plaintiff that transferred its interest in the real estate by absolute deed during the pendency of the action was not the "real party in interest".

In the case of New Rawson Corporation versus the United States, 55 Federal Supplement 291, it was held directly that

where a receiver had sold real estate to a third party, that the third party or grantee is the real party in interest and that suit should be filed in the grantee's name and not that of the original owner or receiver.

It was held in Stern Agency, Inc., et al vs. Mutual Benefit Health and Accident Insurance Company, 43 Federal Supplement 167, that one who has assigned a claim or his interest and has no interest or ownership is not the real party in interest and cannot maintain a suit. The reasoning in this case and the authorities cited are applicable to the question here raised.

Sub-division A of Rule 19 of the Rules of Civil Procedure, provides:

> "(a) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntray plaintiff."

The C. C. Anderson Company, being the owner under a warranty deed and the record showing the payment of the sum of Eighty Thousand Dollars ($80,000) for the property, was certainly an indispensable party in an action to quiet title and any decision by the Court as to the title would directly and adversely affect their title.

> "No Court can adjudicate directly upon a person's right, without the party being actually or constructively before the Court." Mallow vs. Hinde, 12

Wheat 193, 6 L. Ed. 599; Shields vs. Harrow, 17 Howard, 130, 15 L. Ed., 158.

It is appellee's belief that the reported case of State of Washington vs. United States, 87 Federal 2d, 421 in the Ninth Circuit is determinative of this question. As the State of Washington, the owner of the real estate in that action was an indispensable party in an action brought by the United States Government where the State of Washington was not made a party, then it must follow that the C. C. Anderson Company is and was an indispensable party in the present action.

Even if the trial Court had been convinced that the appellee's judgment was not a lien upon the real estate, what form or nature of decree could he have entered without the C. C. Anderson Company being a party? Certainly the receiver, after having made this advantageous sale which he explained at length on the witness stand and having accepted the money, had no further interest in the matter and it is amply disclosed by the record and by Exhibit "4" that the purchaser C. C. Anderson Company was not willing to rely upon a redemption but that in addition to the assignment of the right of redemption required that Jesse M. Chase and his wife give a quitclaim deed to the receiver and also that Jesse M. Chase, Inc., give a quitclaim deed to the purchaser. The appellant in his statement of facts on page 7 of his brief makes this statement: "He went through the motions of a redemption."

II.

THE RECEIVER STANDS IN THE SHOES OF JESSE M. CHASE, INC., AND CERTAINLY CANNOT CLAIM ANY BETTER TITLE THAN THE CORPORATION.

The rule is elemental that the receiver cannot have any stronger claim than the debtor whom the receiver represents and that he cannot assert any stronger claim than his predecessor in interest. Moore, et al. vs. Boise Land and Orchard Company, Ltd., 31 Idaho 390, 173 Pac. 117.

III.

A JUDGEMENT CREDITOR CLAIMING THAT A TRANSFER OF PROPERTY TO A THIRD PERSON IS FRAUDULENT AS TO CREDITORS COULD PROCEED WITH A DIRECT SALE OF THE REAL ESTATE.

The appellee was entirely within her rights and proceeded exactly in accord with a recognized rule of law and decisions in levying directly upon the real estate transfer by Jesse M. Chase, an individual, to Jesse M. Chase, Inc.

The general rules as laid down in 12 Ruling Case Law, Section 126, pages 615-616 and Section 127, pages 619-620, is supported by the great weight of authority and really requires no further citation. However, this procedure was recognized in The Mode, Ltd. vs. Myers, 30 Idaho 159, 164 Pac. 91. The case of Shapiro vs. Wilgus, decided by the United States Supreme Court, 287 U. S. 348, 53 S. Ct. 142,

7 L. Ed. 355 wherein the Circuit Court of Appeals was reversed was reported and digested with an exhaustive note in 5 ALR 198.

This case is nearly in point on the facts, the only difference between the instant case and the Shapiro case is that judgment had been secured against the individual before he formed his corporation. In the instant case the forming of the corporation and the transfer of the debtor's assets clearly was an attempt to place all of the assets beyond the power of his creditors to levy on them. He had nothing left and in addition was the prime mover in the appointment of the receiver; his actions were so nearly those of the debtor in the Shapiro case as to be unusual. In the instant case, the Jesse M. Chase, Inc., did not even take the trouble to answer or to file any pleading whatever and Jesse M. Chase, the President of the corporation, appeared at the hearing without any answer having been filed, either protesting the appointment of a receiver or agreeing to it, and he testified at length in opposition to the appellee's objection to the appointment of a receiver. As pointed out in the Shapiro case, this amounted to an absolute fraud in itself.

Supporting the right of the appellee to proceed as she did the following cases are cited:

Allen v. McGee et al (Cal.) 129 P. 2d 143.

Smith vs. Reid, (N. Y.) 31 N. E. 1082.

(Vernon's Ann. Civ. St. art. 3996.—Colburn vs. Ward, 40 S. W. (2d) 878.

"Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer for value, of the same property, or the rents or profits thereof." 55-901 Idaho Code.

"Every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtors." 55-906 Idaho Code.

Old Honesty Oil Co. vs. Shuler, 11 F. (2d) 176, reversed (C. C. A.) Shuler vs. Old Honesty Oil Co., 18 F. (2d) 894, certiorari denied—Old Honesty Oil Co. vs. Shuler, 48 S. Ct. 115, 275 U. S. 553, 72 L. Ed. 422.

(Civ. Code, pp. 3442). Allee vs. Shay, 268 P. 962, 92 Cal. App. 749.

Bank of Wrightsville vs. Powell, 135 S. E. 922, 163 Ga. 291.

Varn Inv. Co. v. Bankers' Trust Co., 141 S. E. 900, 165 Ga. 694.

Lambert v. Reisman Co., 223 N. W. 541, 207 Iowa, 711.

Runyon v. Bevins, 291 S. W. 1033, 218 Ky. 589.

Carruth v. Jones, 139 So. 655.

Healy-Owen-Hartzell v. Montevideo Farmers' & Merchants' Elevator Co. 212 N. W. 455, 170 Minn. 290.

Swift & Co. v. 1st Nat. Bank, 168 A. 827, 114, N. J. Eq. 417.

Gillette v. Davis, 296 S. W. 658.

IV.

THE ATTEMPTED SALE AND TRANSFER BY JESSE M. CHASE TO A CORPORATION ORGANIZED SOLELY BY HIM FOR HIS OWN BENEFIT UNDER THE CIRCUMSTANCES SHOWN BY THE RECORD, WAS A DIRECT FRAUD UPON THE APPELLEE.

Appellee calls attention to the fact that it is argued in the appellant's brief that it was her duty to have joined Jesse M. Chase, Inc., as a party defendant when she filed her suit in Case No. 1539 in the Federal District Court. It must be borne in mind that the appellee at the time she filed her original suit, had no notice or knowledge of the machinations of Jesse M. Chase in transferring his property. Those facts came out in the trial and she did not recover her judgment until in October, 1949, and the record shows that she immediately caused a levy to be made upon the real estate. All of these facts and circumstances were before the trial Judge who was familiar with the entire proceedings.

The authorities are overwhelmingly in support of the proposition that an individual by the transfer of all of his assets to his own corporation can not place those assets beyond the levy of his creditors and that equity will not permit such a

proceeding. This is true even where the new corporation does not specifically assume the debts but in the instant case the corporation expressly assumed by a Minute Entry, a payment of the Investor's Certificates and we do not believe any case can be found where the indebtedness was expressly assumed that the corporation where it has all of the property, can through a receiver and through an action to quiet title, evade the judgment of the creditors simply on the ground that while the judgment creditor was entitled to judgment directly against the corporation that because the judgment was not so entered that the lien of the judgment creditor is avoided.

In the case of Noll vs. Chattanooga Co. Ltd. et al (Tenn.) 38 S. W. 287, there was a consolidation of two corporations. The original corporation transferred its assets to the new, and the new corporation assumed all of the indebetedness. At the time of the transfer there was an action pending against the original corporation. The case proceeded to judgment and the question before the Court was whether or not the judgment was in fact a judgment against the succeeding corporation.

Certainly there can be no difference whatever in the law principle involved in that case and the instant one. It could make no difference whether suit was pending on Mrs. Sisil's investment certificates when the transfer was made. The investment certificates were subject to suit and as the authorities cited will show notice to Chase or a suit against Chase, the President, was notice to the corporation.

We quote at some length from the Noll case for the rea-

on that it so directly answers appellant's contention.

"* * Respondent new company, further answering, repeats that it did not assume to pay any judgment that might be rendered against the said old company to which it was not a party, and does not now do so, and is not and will not be bound by any such judgment.

"* * Respondent, further answering, avers that, the said Noll being familiar with the fact of said assumption on its part, if he desired to hold it liable and accept said assumption, as he did and does, he should have made it a party to said original suit, so as to bind it by any judgment that might be rendered therein; but he failed to do so, and respondent insists in consequence thereof, and of the fraud and deception hereinbefore set out, and averred to have been practiced by him, it is not bound by said alleged judgment, and cannot be held liable to him on said assumption, except upon a direct suit upon said contract against it. * * * *

"Considering these facts in connection with the pleadings, it will thus be seen that, so far as concerns the question of the assumption of the debt by the new company, the only point of difference between the complainant and the defendant new company is whether the judgment can, in this state of the case, be used in evidence against the new company, to ascertain the amount assumed; or, to state it differently, whether the new company is liable to suit upon the judgment, or whether, in order to hold it liable upon the assumption, a suit must be brought upon the original cause of action. It would be very singular, and the result of a highly technical ruling, if under the circumstances, and considering the relations of the parties to the subject-matter, it should be held necessary for the parties to go over all this long and tedious litigation again. The defendant new company

took over all of the assets of the old company, and agreed to pay all of its debts. * * * *

"* * Before the new arrangement was made, the old company owned the property, and was liable for the debt, whatever its true amount might be. After the new arrangement, the new company owned the property, and became, by agreement, liable for the debt, whatever it might be. Meanwhile, the litigation already in existence when the new arrangement was undertaken proceeded for the ascertainment of the amount due. We think, under these circumstances, the old company should be treated as the agent or representative of the new company, for the conduct of the litigation and the ascertainment of the amount due; hence the parties would be in privity, and the judgment against the old company would be binding upon the new. Herm. Estopp. pp 137, 152. Again, stated differently, after the new arrangement was effected, the new company having all the assets of the old company, and having assumed all its debts, the old company was but a nominal party to the litigation. The real party in interest was the new company. 21 Am. & Eng. Enc. Law, p. 141, and note 3."

On the question of whether or not the notice to Chase who was president of the corporation and the managing officer, being notice to and binding on the corporation, and that the suit against Chase was a suit against the corporation, see Cowthra vs. Stuart, 109 N. Y. S. 77.

We also call attention to the language of the Court in James vs. Stokes, (Ky.) 261 S. W. 868.

In discussing the identical position of the plaintiff here, the Court said:

"We have seen in this case that the evidence, in the light of the surrounding facts, proves a fraudulent

intent on the part of Stokes, the grantor, and on the assumption that there was a valuable consideration for the deed, then the question to be determined is whether the grantee, defendant Melvyn Realty Company, had knowledge of his fraudulent intent, which counsel for defense gravely insists was untrue. Their contention in that respect is to our minds so fallacious and unfounded as to embarass us in an attempt to refute it. We are asked by counsel to hold that Stokes, as the sole and only stockholder in the corporation and the only one entitled to hold any office in it, did not know his intent and purpose as an individual dealing with himself as sole stockholder, which, if true, presents a puzzle more intricate and confusing than the proverbial Chinese one. It is so much so that we have determined to solve the question by holding that what Stokes individually knew he also knew as the sole owner of the corporation defendant."

As showing the position of the Idaho Court in matters of his kind, we call attention to the case of Seymour vs. Boise t. R. Co., Ltd., 24 Idaho 7, 132 P. 427. The syllabus in hat case is as follows:

"Where a new corporation is formed by stockholders and directors of an existing corporation, and the directors of the new corporation are the same persons who were a majority of the directors of the old corporation, and 98 per cent of the issued stock of the new corporation is held by the same persons who were stockholders in the old corporation, and the new corporation purchases all the franchises and property of the old corporation and pays therefor in shares of the capital stock of the new corporation and in cash to the amount of 87½ per cent of the par value of $150,000 worth of first mortgage bonds of the new corporation, HELD, that the transaction amounts in fact and law to a reorganization of the old corpora-

> tion, and that the new corporation is liable for a judgment against the old corporation which was rendered for damages on account of personal injuries inflicted by the old corporation."

The same rule was observed in Moore vs. Boise Land and Orchard Company, Ltd., 31 Idaho 390, 173 P. 117 where the court recognized where two corporations consolidated, that in the absence of any assumption of indebtedness by the new corporation or allegation of fraud or that the one was a continuation of the other, that there would not be any liability upon the newly formed corporation.

The case of Tom O. Mason Co. vs. Pouse, et al., 227 N. W. 392, is squarely in point on the facts. The statute in Wisconsin, that is their statute of frauds, is very similar to the statute of frauds in Idaho. It contains a provision that the injured party could bring an action to set aside the fraud conveyance, but this merely stated a rule of equity and the case is directly in point.

The following authorities support the appellee's position:

Shapiro vs. Wilgus, supra.

Gillette, et al., vs. Davis, (Tex.) 296 S. W. 658.

Roberts vs. W. H. Hughes Co. (Vt.) 83 Atlantic 807.

12 Ruling Case Law, Section 12, Page 480.

Limitation of the Corporate Entity by Anderson Sec. 72, 84, 132, 134 and 139.

Stanford Hotel Co. vs. M. Schwind Co., 180 Cal. 348, 180 Pac. 780.

Blanc vs. Paymaster Mining Company, 95 Cal. 524 30 Pac. 765.

V.

PRACTICALLY ALL OF THE ASSETS OF JESSE M. CHASE, BEING PERSONAL PROPERTY, ANY SALE AND TRANSFER OF THE SAME WAS SUBJECT TO THE BULK SALES ACT OF IDAHO.

The appellant argues that the sale of the Jesse M. Chase enterprises to Jesse M. Chase, Inc., was a valid, bona fide sale. If the appellant had established this to the satisfaction of the trial Court or should establish it to the satisfaction of this Court, then he would bring himself squarely within the provisions of the Idaho Code with reference to the Bulk Sales Act, Sections 64-701, 64-702 and 64-705.

> "64-701. *Vendor to make statement of indebtedness.* It shall be the duty of every person who shall bargain for or purchase any portion of the stock of goods, wares or merchandise in bulk, or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or an entire stock of merchandise in bulk for cash or on credit or any portion of the property, furniture, fixtures, or equipment or supplies of a hotel, restaurant, barber shop or any place of business wherein the furniture, fixtures, or equipment are used in carrying on said business, otherwise than in the regular course of trade before paying to the vendor or his agent or representative or delivering to the vendor or

his agent or representative any part of the purchase price thereof, or any promissory note or other evidence of same, to demand and receive from such vendor or his agent, or if the vendor or agent be a corporation, then from the president, vice president, secretary, or managing agent of such corporation, a sworn statement in writing substantially as hereinafter provided of the names and addresses of all the creditors of said vendor to whom said vendor may be indebted, together with the amount of the indebtedness due or owing or to become due or owing, by said vendor, to each of said creditors, and it shall be the duty of said vendor or his agent to furnish such statement which shall be verified by oath to substantially the following effect: * * * *

"64-702. *Liability of vendee.* Whenever any person shall bargain for the purchase in bulk of any portion of a stock of merchandise or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or an entire stock of merchandise in bulk or the property, furniture, fixtures, equipment or supplies of a hotel or restaurant, barber shop or other place of business wherein the furniture, fixtures, and equipment are used in carrying on said business, otherwise than in the regular course of trade, for cash or on credit, and shall pay any part of the price, or execute and deliver to the vendor thereof, or his agent, or to any person for his use, any promissory note or other evidence of indebtedness, or give credit, whether or not evidenced by promissory note or other evidence of indebtedness, for said purchase-price or any part thereof, without at least five days previously thereto having demanded of and received from said vendor or from his agent the statement provided for in section 64-701 and verified as therein provided, and without notifying also at least five days previously thereto, person-

ally or by registered mail, every creditor as shown upon said verified statement of said proposed sale or transfer, with the price thereof, the person to whom said sale or transfer is made, and the time and conditions of payment, and without paying or seeing to it that the purchase-money of the said property is applied to the payment of the bona fide claims of the creditors of the vendor as shown upon said verified statement, share and share alike, unless otherwise provided for by the statutes designating priority of payments, such sale or transfer shall be fraudulent and void, and said vendee shall be personally liable to any creditor or to all creditors of said vendor for their proportionate share of the purchase-price of said business, whether the same has been paid by vendee to vendor or not.

"64-705. *Application of law.* Sellers, or vendors and purchasers under this chapter, shall include corporations, associations, copartnerships and individuals, but nothing contained in this chapter shall apply to sales or transfers by executors, administrators, receivers, or assignees, under a voluntary assignment for the benefit of creditors, trustees in bankruptcy or any public officer under judicial process."

The consolidated statement of Chase's financial condition at the time he made his transfer, which was introduced in evidence, showing assets of a million dollars, shows conclusively that only approximately Eighty Thousand Dollars ($80,000) of this was for lands and buildings; that the stock of used automobiles, trailers, parts, accessories and tires amounted to approximately Seven Hundred Thousand Dollars ($700,000) and were all of the substantial assets that he held.

The appellant seeks to avoid the affect of the Bulk Sales Act by arguing that it does not apply to real estate. However, the mere fact that an individual engaged in the buying and selling of used automobiles, replacement parts and accessories owned some real estate did not exempt him from compliance with the Bulk Sales Act.

> "A transfer of the entire assets, consisting of personal property, of a commercial partnership engaged in the business of buying and selling automobiles, replacement parts, and accessories, to a new corporation formed by individual members of the former partnership, is within a provision of a Bulk Sales Law declaring that sales in bulk and otherwise that in the ordinary course of trade and in the regular and usual prosecution of the business of the transferrer, of any portion or the whole of a stock of merchandise shall be void as against creditors of the transferrer, unless made in conformity with the provisions of the act." Brinson vs. Monroe Auto. & Supply Co., et al. (La.) 158 So. 558.

In the case of West Shore Furniture Co. vs. Murphy, 141 N. Y. S. 835, it was held that where the insolvent continuing partner of a mercantile firm transferred his whole stock in trade to a newly created corporation in consideration for the whole capital stock that the transaction was governed by the Bulk Sales Law of New York and was clearly fraudulent as to creditors.

In Kline vs. Sims (Miss.) 114 So. 871, where it was alleged that the owner of an insolvent mercantile business formed a corporation to take over the business without complying

with the Mississippi Bulk Sales Law, that the sale was void and fraudulent to the creditor of the original business to whom notice of the sale was not given in accordance with the Bulk Sales Act. See also, First National Bank vs. Davis, 147 Mo. 93 and Smith-Calhoun Rubber Co. vs. McGhee Rubber Co., 235 S. W. 321.

It was held in Sakelos vs. Hutchinson Bros. 99 Atl. 357, that under the Bulk Sales Act, a transfer, by a partnership operating a restaurant, of its assets to a corporation formed by its members is void as to a creditor, there having been no compliance with the requirements of the Bulk Sales Act.

In the case of First National Bank vs. Raleigh Savings Bank and Trust, 4th Circuit, 37 Fed. (2d) 301, that a transfer of a large part of the merchandise to a seperate corporation organized for that purpose, which assumed none of the debts, and merely issued its capital stock in payment, constituted a sale which was void as to creditors because of non-compliance with the North Carolina Bulk Sales Law.

The cases holding that where an individual transfers his assets to a corporation in return for its stock is not within the Bulk Sales Act, are reasoned and based solely upon the proposition that there has been a bona fide sale and that it is merely a shifting of the assets and that it is no more than the individual doing business under a fictitious or assumed name but there is no law to the effect that either an individual or a corporation making a bona fide sale of all of his or its assets to another for an independent and valuable consideration is not required to comply with the Bulk Sales Act. Goodman vs. Clarkson, 147 S. E. 183, Stockyards Pet. Co. vs. Bedell

(Kans.) 278 Pac. 739; B. F. Goodrich Rubber Co. vs. Breland, 154 So. 303; Mott vs. Reeves, 211 N. Y. S. 375, affirmed 215 N. Y. S. 889, affirmed 159 N. E. 654; Raleigh Tire and Rubber Company vs. Morris, (N. C.) 106 S. E. 562.

We believe the only cases that can be found holding that in a transaction where all of an individual's assets, when transferred to a corporation in exchange for corporate stock is not a fraud upon creditors, are those cases that reason that the individual still has in his possession the corporate stock and that it is sufficient to satisfy his obligation upon attachment. These cases are not in point here and are against the weight of authority. The appellee proceeded diligently in Case No. 1539 and there is no showing and can be no showing made that when she filed her suit in the District Court and when she recovered her judgment in Case No. 1539, that a levy upon the corporate stock owned by Jesse M. Chase would have been of any benefit, in fact it would have been absolutely futile. He was insolvent then according to his own testimony and the corporation was insolvent at that time and he advised her even before she filed her suit (Exhibit "13") that if she filed it, the corporation would go into a receivership.

VI.

ANALYSIS OF THE ARGUMENT IN APPELLANT'S BRIEF.

The appellant among other things argues, as he states it on page 21 of his brief, redemption by successor in interest

/kes redeemed property from the lien and in support thereof, ted Evans vs. City of American Falls 52 Idaho 7, 11 Pac. 2d) 363. The case cited shows without any further explana- on that it is not a point and further that it is directly in the ppellee's favor. The California Code referred to the case of impson vs. Castle, 52 Cal. 644, wherein the Court in con- truing the statute identical with Idaho's, held in part.

> "In case of a redemption by the judgment debtor or the mortgagor, the affect of the sale is extinguished, and the statute declares he is restored to his estate in the land, which then, for the first time, become subject to the lien of the unsatisfied portion of the judgment."

The redemption, if any redemption was made, and the appellant in one breath claims there was not a redemption and in the next claims there was, was only a redemption by the receiver from a valid judgment against him.

However, this certainly can not be very important in view of the attempted explanation made by the receiver under the questioning of the trial Court at the time of the hearing. (Pages 93-94).

The appellant argues that the appellee's answer and affirmative defense do not state facts sufficient to constitute a defense or to state a cause under the counter-claim. However, he cites no authorities whatever in support of this argument and having made no objection of this nature before or during the trial, such an argument is of no force in view of the Federal Rules of Civil Procedure with reference to pleading.

It is shown that the receiver had paid all judgments

against Jesse M. Chase, Inc.; Jesse M. Chase, himself, testified that this particular judgment was one against the corporation and should be paid by it, the appellee was entitled to a judgment of the trial Court, that the receiver be directed to treat her judgment the same as all others and having subjected himself to the jurisdiction of the Court he is bound by the judgment.

It is also argued in the appellant's brief that the transfer from Chase to the corporation was a bona fide transaction; that Chase was in fine financial condition and not involved.

To say the least, there is certainly evidence in the record to support the trial Judge's findings after seeing and hearing the witnesses and being familiar with all of the facts developed in the different suits, he found against the appellant's contention.

Jesse M. Chase could certainly be and was heavily involved without necessarily being insolvent. Regardless of what his financial statement may have shown at the time he transferred all of his property to the corporation, he was involved by reason of a large contingent liability as is shown by the different exhibits and he wanted to escape any personal liability. He also showed by his testimony in the State Court and in the instant case that after he had transferred all of his assets, he did not have any property or anything to pay with. The argument that he had his stock in his own corporation and that the appellee was negligent because she did not sue that corporation in the first place, begs the whole question. How could the appellee know the extent to which Chase was

volved or that he would transfer all of his property until ese facts were developed in the litigation? Chase threatened ppellee with the receivership when she made demand upon im for the payment of her investor's certificates and he was ill corresponding with her on Jesse M. Chase stationery and riting both as an individual and president of his corporation. ee Exhibit "13" written under date of November 30, 1949, herein he stated to her:

> "If you do insist upon your money, then I will go ahead and sell out and do it in an orderly way and everybody will be paid, but if you file suit and it causes the appointment of a receiver, then I will be in a position that I can't tell you what will be the result."

This was over two years after the formation of the Jesse M. Chase, Inc., and Mr. Chase was still speaking in the first person as the sole owner and operator of Jesse M. Chase, Inc.

> "The mere fact that a person is solvent as and when he transfers his property does not necessarily render him incapable of making conveyances fraudulent to his creditors. While solvency when transfer is made affords evidence against a claimed fraudulent purpose, it is only an item of evidence to be considered with all the other facts".
>
> August Lind, Receiver vs. Johnson Co. (Minn.) 282 N. W. 661, 119 A. L. R. 940.

It is argued by appellant that the annotation in 85 A. L. R. at Page 140 is authority for the position that Chase's transfer to his own corporation under the circumstances did not amount to a fraud upon creditors. We submit that the quoted portion of the editor's comment appearing on page 17 of

appellant's brief does not fit the circumstances in the instant case and justify the trial Court in making the decision he did.

Attention is called to the appellant's Specification of Error No. 6. This specification has to do with the Court's Finding of Fact No. XII. The specification which is found on page 15 of appellant's brief is:

> "The trial court erred in making Finding of Fact No. XII (P. 27) for the reason that the same is a conclusion of law, contrary to both the evidence and the law."

This finding, which is set forth in our Statement of Facts, certainly is not a conclusion of law and it is based upon the evidence and supported thereby. The appellant's treatment thereof at the bottom of page 30 and the top of page 31 of his brief, indicates that he has misinterpreted the finding or that he is discussing something else. The finding is not a finding to the effect that the appellee sold the real estate involved; it is a finding to the effect that the plaintiff in the District Court, the appellant here, sold the real estate and the finding, of course, has reference to the sale of the real estate to the C. C. Anderson Company. It appears from the record that this is the fact.

Appellant, on page 23 of the brief, takes the position that anything that happened to the title to the property involved, after the commencement of the action, can not have any bearing on the instant case and reasons from this that a transfer of the title, pending the suit, has no effect whatever upon the rights of the defendant. This argument can not

and as is shown by the authorities heretofore cited and the gument that the receiver having accepted a quitclaim deed om Jesse M. Chase and an assignment in his right of re-mption, stands in the position of a bona fide redemptor is ot supported by any citation of authorities and merely ows the utter confusion that the receiver is in as to what eory he could follow in order to make a sale of the real state and at the same time still preserving his rights to laim as the owner thereof and to prevent the appellee from atisfying a valid judgment.

It is respectfully submitted that the judgment should be ffirmed.

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